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No. ~~90-28~~

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STEVEN BROSTOFF,

Petitioner,

—v.—

HON. CAROL BERKMAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STEVEN BROSTOFF,

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—against—

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Introduction

This is an appeal by petitioner, an Assistant District Attorney for New York County, from an order of the Court of Appeals of the State of New York (A 1-3)[1] which affirmed the judgment of the Appellate Division, First Department. The Court of Appeals held that respondent Justice's adjudication of summary criminal contempt against petitioner for his willful failure to obey the respondent's lawful order to depart from the well area of the courtroom was within respondent's authorized powers and fully supported by the record.

1 ("A____") refers to the Appendix to the Petition.

Statement of the Case

A. The Summary Contempt Adjudication

Respondent is a Judge of the Criminal Court of the City of New York, designated since 1982 to sit in the Supreme Court of the State of New York. At all times relevant to this proceeding, she was presiding over one of the three arraignment and assignment parts in New York County.

The record shows that on May 23, 1990, petitioner entered the well of the courtroom designated AA part 50 while another proceeding, not involving petitioner, was being heard by respondent Justice.[2] As in most courts, state and federal, the well of Part 50 serves as the area of the courtroom designed for litigants whose case is actually being heard; parties having business in the court ordinarily do not enter the well until their case is called.

Upon observing that petitioner had entered and remained in the well while the court was engaged in a bench conference, the court issued a clear and audible order to petitioner that he "[g]et out of the *well*." (AA 41) (emphasis added). That petitioner heard and understood respondent is reflected by his immediate rejoinder that he "[had] a right to be *here* [sic] I am a deputy bureau chief of this bureau. I am entitled to check my cases." (AA 41) (emphasis added).

The court did not accept petitioner's contention that he was entitled to disregard the explicit order of the court and remain in the well because of some perceived "right to be [t]here" based upon his title. (AA 41). Therefore, the court once again ordered, in clear and express terms, that petitioner "[g]et out of the *well*, you are not permitted to be in the *well* in my courtroom. *Sit in the audience*." (AA 41) (emphasis added).

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2 *See* Minutes of the May 23, 1990 Proceeding ["Minutes"], contained in the Appendix to Appellant's brief ["AA"] submitted to the New York Court of Appeals, at AA 40-43.

After a pause long enough to permit petitioner to comply, respondent Justice gave petitioner his choice of leaving the well through the normal public access or the door to the pen: "You either step out that way or that way Mr. Brostoff." (AA 41). (*See also* respondent Justice's Order Denying Motion to Vacate Contempt, at AA 68-69).

Once again, rather than comply with a clear directive by the court, petitioner chose to defy it by stating: "I will go that way [indicating the pens]." (AA 41). Petitioner conceded below that this statement was "regrettable" and "unfortunate."[3] By his disrespectful comment, and his refusal to leave the well, petitioner clearly demonstrated his intent to willfully disobey the court's lawful mandate and to interfere with the functioning of the court's calendar. Petitioner acknowledges that he "thus indicated his unwillingness to leave the courtroom." (AA 85). It was only then, after petitioner's unequivocal statement that he was refusing to abide by the court's order without legal compulsion, that he was summarily held in contempt of court.

The record shows that respondent Justice afforded petitioner the requisite opportunity to be heard in connection with the contempt. After the court advised petitioner he was being held in contempt, the court stated: "I will hear you on sentence." (AA 42). Petitioner availed himself of this opportunity to make a statement. (AA 42). In addition, the court had the benefit of petitioner's earlier statement in response to the initial order: "I have a right to be here [sic] I am a deputy bureau chief of this bureau. I am entitled to check my cases." (AA 41).

Subsequently, the court issued its mandate.[4] The mandate states that petitioner refused to heed the court's instructions in a willful, disorderly and contumacious manner, and incorporates the transcript of the May 23 proceeding. Petitioner was fined fifty ($50) dollars, or, in the alternative, subject to three days' imprisonment; petitioner's office paid the fine. (A 44).

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3 *See* Petitioner's Memorandum of Law in Support of the Petition at AA 74, 81.

4 *See* Mandate of Order Adjudging Contempt at AA 44-45.

B. The Appellate Division Decision

The Appellate Division, First Department, ruling 4-1, denied the petition and dismissed the proceeding. *Brostoff v. Berkman*, 170 A.D.2d 364, 566 N.Y.S.2d 927 (1st Dept. 1991). (A copy of the court's decision and order is contained at A 4-18). The court held that respondent Justice correctly exercised her authority to summarily punish petitioner for his contemptuous behavior committed in the immediate view and presence of the court, which behavior interrupted the court's business, impaired the respect due the court and was done in a willful, defiant manner. *Id.* at 365-366, 566 N.Y.S.2d at 927-928 (A 5-8). In particular, the court found that "petitioner was not directed to remove himself from the courtroom; he was simply ordered from the well. . ." *id.* at 365, 566 N.Y.S.2d at 928 (A 6), and that "it is evident that he not only deliberately disobeyed the court's command but his behavior was derisive of the court's authority." *Id.* (A 7).

The court further held that respondent Justice's order was lawful and was issued well within her discretion and authority to govern the functioning of the court. Accordingly, petitioner's continued refusal to abide by respondent Justice's directives was "unwarranted . . . so long as [the order was] lawful, he was obliged to obey." *Id.* at 366, 566 N.Y.S.2d at 928 (A 8).

The court concluded that: "[p]etitioner's conduct was wilful, defiant, contemptuous and generally offensive, and consequently, the summary finding of contempt was fully supported by the record." *Id.*

The dissenting justice stated that, in his view, "the finding of contempt . . . constitutes a gross deviation from the judicial obligation of impartiality and was the result of an oppresive application of the contempt power." *Id.*

C. The Court of Appeals Decision

The New York Court of Appeals unanimously affirmed the judgment of the Appellate Division. *Brostoff v. Berkman*, 79 N.Y.2d 938, 582 N.Y.S.2d 989, 591 N.E.2d 1175 (1992)

(A copy of the memorandum opinion is contained at A 1-3). The Court of Appeals found that because petitioner had "willfully refused to exit the well area after an explicit and unambiguous judicial order to do so[,]" the "prerequisites for respondent's adjudication of summary contempt" had been satisfied. *Id.* at 940, 582 N.Y.S.2d at 990, 591 N.E.2d at 1176 (A 2). The court held that " '[h]owever misguided and erroneous the court's order may have been, petitioner was not free to disregard it and decide for himself the manner in which to proceed' (*Matter of Balter v. Regan*, 63 N.Y.2d 630, 631)." *Id.* In addition, the court rejected as meritless petitioner's arguments that his due process rights were violated and that the mandate was defective under New York Judiciary Law § 752. *Id.*

Reasons For Denying The Writ

A. The Court of Appeals Decision Does Not Bring Up For Review Any Issue Which Requires Resolution By This Court

Petitioner claims that this Court should grant review so that it may "resolve important issues concerning the judicial contempt power . . . which this Court was unable to reach in *United States v. Providence Journal Co.*, 485 U.S. 693 (1988)." Petition, pp. 13-14. To the contrary, the instant case does not offer an opportunity to resolve such issues because it is significantly dissimilar, both on the facts and on the law.

Although it was ultimately dismissed for want of jurisdiction, this Court granted certiorari in *Providence Journal* "[b]ecause of the importance of the issues." 485 U.S. at 698. As stated by the First Circuit, the *Providence Journal* case involved a "conflict between two fundamental legal principles: the hallowed First Amendment principle that the press shall not be subject to prior restraints; the other, the *sine qua non* of orderly government, that, until modified or vacated, a court order must be obeyed." *Matter of Providence Journal Co.*, 820 F.2d 1342, 1344 (1st Cir. 1986), *modified*, 820 F.2d 1354 (1st Cir. 1987) (*en banc*), *cert. dismissed sub nom. United States v.*

Providence Journal Co., 485 U.S. 693 (1988). The Circuit Court held in *Providence Journal* that, contrary to the 'collateral bar' rule that a party may not violate an order and then raise the issue of its unconstitutionality collaterally as a defense in the criminal contempt proceeding, a party subject to an order that constitutes a "transparently invalid" prior restraint on pure speech may challenge the order by violating it, rather than by seeking its modification or vacatur. *Id.* After rehearing *en banc*, the First Circuit modified its opinion and took the position that a party subject to a transparently unconstitutional prior restraint should make a good faith effort to seek emergency appellate relief, prior to violating the order. 820 F.2d 1354, 1355.

The First Circuit relied on this Court's decision in *Walker v. City of Birmingham*, 388 U.S. 307 (1967) as the source for the "transparently invalid" exception to the collateral bar rule. 820 F.2d at 1346-47 and n. 26. In defining a transparently invalid order, the court stated that a "heavy presumption in favor of validity" adheres to a court order, and that if a reviewing court "finds the order to have had any pretence to validity at the time it was issued," the collateral bar rule should be enforced. *Id.* at 1347. Nevertheless, the prior restraint in *Providence Journal* was found to be transparently invalid. In so finding, the court reasoned that in the case of a prior restraint on pure speech, *i.e.*, speech not connected with any conduct, there is a presumption of unconstitutionality that is "virtually insurmountable," and that, in nearly 200 years, this Court has never upheld a prior restraint on pure speech. *Id.* at 1348.

Petitioner argues that this case provides an opportunity to resolve the conflicting principles of collateral bar and prior restraint at issue in *Providence Journal*. Petition, p. 17. This is a curious position since the case at bar does not concern a prior restraint, and indeed, as petitioner concedes, "there is no First Amendment issue here." Petition, p. 17. Petitioner, however, attempts to analogize between the temporary restraining order barring publication in *Providence Journal* and the respondent's order directing petitioner to leave the well of the courtroom. Petitioner apparently contends that the alleged due process

deficiencies of respondent's order should qualify it as transparently invalid, and thus give rise to an exception to the collateral bar rule. Petition, pp. 17-21.

Given a court's inherent power to regulate its activities to preserve order and decorum, it is difficult to understand how a judge's direction to an attorney to depart from the well of her courtroom could be construed as transparently invalid. *See People v. Jelke*, 308 N.Y. 56, 63, 123 N.E.2d 769, 772 (1954); *People ex rel. Karlin v. Culkin*, 248 N.Y. 465, 162 N.E. 487 (1928); *Goldberg v. Extraordinary Special Grand Juries of Onondaga County*, 69 A.D.2d 1, 7, 418 N.Y.S.2d 695, 698 (4th Dept. 1979). As the Appellate Division noted in this case: "it is within the domain of the judge to regulate what occurs in his or her courtroom, including activity in the well. If a Judge wishes to have the well cleared, that is his or her right, and neither defense counsel nor the prosecutor may ignore the court's direction in that respect." *Brostoff v. Berkman*, 170 A.D.2d at 365-366, 568 N.Y.S.2d at 928 (A 7). Petitioner can point to no authority to the contrary.

Assuming, *arguendo*, however, that the analogy petitioner draws is valid, it still would not provide this Court with an opportunity to review the primary issue raised by *Providence Journal*, because, contrary to petitioner's assumption, the collateral bar rule was not involved in the reasoning or decision of either of the courts below. Thus, petitioner erroneously asserts that the Court of Appeals "invoked the collateral bar rule" to reach "the conclusion" that petitioner could not challenge, in the contempt proceeding, the constitutional validity of the respondent's order, even if the order was arbitrary and capricious. Petition, pp. 14-15.

In fact, rather than deeming petitioner's allegation that the respondent's order was arbitrary and capricious irrelevant to the contempt proceeding, both lower courts considered and rejected that claim.[5] The Appellate Division specifically found

5 It should be noted that the petition did not directly challenge the constitutional validity of respondent's direction to leave the well of the courtroom, but only alleged that "respondent's actions reflect an arbi-

that respondent's command to leave the well of the courtroom was a "lawful order" which petitioner had refused to comply with or abide by. 170 A.D.2d at 365, 566 N.Y.S.2d at 927-928 (A 5-7). Indeed, the court necessarily ruled on the underlying validity of the order in holding that petitioner could properly be punished for criminal contempt under New York Judiciary Law Section 750(A)(3),(4) for "wilful disobedience to [the court's] lawful mandate" and "resistance wilfully offered to [the court's] lawful mandate."[6] 170 A.D.2d at 365, 566 N.Y.S.2d at 927-928 (A 5-6). In affirming, the Court of Appeals also stated that petitioner's willful refusal to exit the well in the face of respondent's "explicit and unambiguous judicial order" to do so "satisfied the prerequisites for respondent's adjudication of summary contempt" under New York Judiciary Law sections 750(A)(3),(4). 79 N.Y.2d at 940, 582 N.Y.S.2d at 990, 591 N.E.2d at 1176 (A 2). In addition, the court rejected petitioner's arguments that his due process rights were violated, characterizing them as "without merit." *Id.*

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trary and capricious abuse of the judicial contempt power." Verified Petition, ¶ 9 (A 23). That the lower court did not explore the constitutional challenge to the extent to which petitioner now, in hindsight, wishes it had may thus be attributable to petitioner.

6 *New York Judiciary Law § 750* provides in pertinent part:

Power of courts to punish for criminal contempts

A. A court of record has power to punish for a criminal contempt, a person guilty of any of the following acts, and no others:

1. Disorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority.

* * *

3. Wilful disobedience to its lawful mandate.

4. Resistance wilfully offered to its lawful mandate.

"Mandate", as used in the statute, can encompass an oral directive by the court. *Cf. People ex rel. Illingworth v. Oyer & Term.*, 10 A.D.2d 25, 29, 41 N.Y.S. 702, 704 (1st Dept. 1896) ("[t]he word "mandate" here is evidently used in the sense of a command or order or direction which the court is authorized to give and which a person is bound to obey").

Thus, there is no basis in the decisions below from which to infer that the lower courts invoked the collateral bar rule and refused to entertain a constitutional challenge to the validity of respondent's order.

Moreover, the collateral bar rule could come into play only if there had been an opportunity for effective review of the order before it was violated. *See* 3 Wright, *Federal Practice & Procedure: Criminal 2d* § 702 at 815 (1982); 13A Wright, Miller & Cooper *Federal Practice & Procedure: Jurisdiction 2d* § 3537 at 546-547 (1984); *Maness v. Meyers*, 419 U.S. 449, 460 (1975); *United States v. Ryan*, 402 U.S. 530, 532-533 (1971). In this case, as petitioner points out, the order to leave the well was so immediate and peremptory as to preclude any opportunity to challenge it without violating it. Petition, p. 20. Accordingly, there was no reason for the courts below to invoke the collateral bar rule, and, as noted above, they did not do so.

It is well-established that a person to whom a court directs an order must abide by that order or risk criminal contempt. *Maness*, 419 U.S. at 458-459. As stated below, "'[h]owever misguided and erroneous the court's order may have been, petitioner was not free to disregard it and decide for himself the manner in which to proceed' (*Matter of Balter v. Regan*, 63 N.Y.2d 630, 631)." *Brostoff*, 79 N.Y.2d at 940, 582 N.Y.S.2d at 990, 591 N.E.2d at 1176 (A 2). When ordered to exit the well, petitioner had a choice: comply with the order, or risk summary criminal contempt. Petitioner chose to defy the court's order. Petitioner had an opportunity to have his adjudication of contempt reviewed; upon review, he was not barred from challenging the contempt as based on an unlawful, unconstitutional mandate. Accordingly, this case does not present a significant issue concerning the collateral bar rule for review by this Court.

B. The Court of Appeals Decision Is Consistent With This Court's Precedents On The Due Process Right To An Impartial Tribunal.

The second ground on which petitioner seeks review by this Court is that the respondent Judge was allegedly motivated solely by personal antipathy toward petitioner and petitioner was therefore deprived of his due process right to an impartial tribunal. Petition, pp. 21-24. Because this assertion is without basis in the record, petitioner seeks support from several cases in which this Court has reversed a summary criminal contempt finding where the right to an impartial judge was implicated. Petition, pp. 22-24. The authority upon which petitioner relies is readily distinguishable.

Petitioner's contention that respondent Justice held him in contempt solely out of personal animosity is not borne out by the record. Respondent, in the proper exercise of her authority to control her courtroom, asked petitioner to leave the well of the courtroom, "an area in which it may well be disruptive to court proceedings to have persons carrying on conversations while cases are being heard." *Brostoff v. Berkman*, 170 A.D.2d at 365, 566 N.Y.S.2d at 928. (A 6).[7] Instead of promptly abiding by the court's lawful directive, petitioner's response to the judge's mandate was to "announce insolently that 'I have a right to be here[.] I am a deputy bureau chief of this bureau. I am entitled to check my cases.' " *Id. Cf. Matter of Katz*, 28 N.Y.2d 234 at 240, 321 N.Y.S.2d 104 at 109, 269 N.E.2d 816 at 819 (1971) (it "is essential . . . that spectators not be allowed or encouraged to inject themselves into the trial process, or to spawn time-consuming or distracting collateral proceedings to determine their responsibility for disorder in the courtroom").

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7 Petitioner claims he did not disrupt the proceedings. However, even if it was respondent who spoke first, it was petitioner's repeated refusals to vacate the well which, in fact, disrupted another proceeding. The record is clear that there was a bench conference in progress in a "New York County case", which was "not [petitioner's] case." (AA 41-42). The minutes also reflect that there was a calendar in progress: "Calendar number 58 Giovani Lopez." (AA 41). Petitioner himself concedes that "[w]hen [he] entered the well, a bench conference was in progress on

Petitioner persisted in his refusal to obey the court. It was therefore petitioner's "generally offensive", willful, and defiant behavior that ultimately resulted in sanctions, not respondent's alleged bias. Had petitioner simply obeyed the directive in a prompt, inoffensive manner, there would have been no basis upon which the court could have found him in contempt. Indeed, "regardless of the judge's attitude toward petitioner, there was simply no excuse for petitioner's lack of respect for the court and refusal to abide by its lawful order." *Brostoff* 170 A.D.2d at 365, 566 N.Y.S.2d at 927 (A 5). As the rules of the Appellate Division, First Department state: "[t]he attorney is not relieved of [his] obligation [to uphold honor and maintain a respectful attitude toward the court] by what he may regard as a deficiency in the conduct or ruling of a judge . . . ." 22 New York Code of Rules and Regulations § 604.1(d)(7).[8]

Moreover, the court below correctly found that petitioner's due process claim is without merit. The precedents cited by petitioner are not to the contrary. In contrast to this case, all of the cases cited by petitioner (Petition, pp. 22-27) involve instances where the record established that the judge had become personally embroiled with the petitioner during the conflict in issue. In addition, none of the cases concern a sit-

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another matter." (A 37). Since the case being conferenced had nothing to do with petitioner, he had "no business in the well", an area of the court reserved for cases actually being heard by the court.

8 *22 NYCRR Part 604* provides in pertinent part:

Special Rules Concerning Court Decorum

§ 604.1(d)(1) The attorney is both an officer of the court and an advocate. . . . It is also his obligation to uphold the honor and maintain the dignity of the profession. He must avoid disorder or disruption in the courtroom and he must maintain a respectful attitude toward the court. In all respects, the attorney is bound, in court and out, by the provisions of the Code of Professional Responsibility.

* * *

(d)(7) The attorney is not relieved of these obligations by what he may regard as a deficiency in the conduct or ruling of a judge or in the system of justice; nor is he relieved of these obligations by what he believes to be the moral, political, social, or ideological merits of the cause of any client.

uation like the case at bar, where the final adjudication of contempt and sentence came as an immediate corrective to the contumacious conduct. In any event, the contempts in the cited cases were vacated, in part, on the basis of factors additional to the personal embroilment of the judge with the petitioner.

In *Cooke v. United States*, 267 U.S. 517 (1925), an attorney wrote a letter to the judge who had presided over his case which evinced his displeasure over the judge's conduct in the case and characterized it in language personally derogatory to the judge. The contempt was reversed on the procedural ground that there was no basis for an immediate summary adjudication of contempt because "the objectional words had [not] been uttered against him in open court." The case was remanded for a hearing on the contempt. *Id.* at 533-537.

In *Offutt v. United States*, 348 U.S. 11 (1954), the judge became so personally embroiled during a trial that it jeopardized detached post-trial adjudication of the contempt. For example, the judge made statements to the attorney such as "[i]f you say another word I will have the Marshal stick a gag in your mouth". (*Id.* at 16 fn. 2). Further, when the judge instructed the jury, he stated: "I . . . realize that you had a . . . disagreeable task in this case. You have been compelled to sit through a disgraceful and disreputable performance on the part of a lawyer who is unworthy of being a member of the profession . . . I, as a member of the legal profession, blush that we should have such a specimen in our midst." (*Id.* at 16 fn. 2). Due to the evidence on the record of the alleged contempt of extreme personal embroilment by the judge, the case was remanded for a hearing, by another judge, regarding the attorney's "reprehensible" and "contemptuous" conduct. *Id.* at 18.

In *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971), the contemptuous exchanges over the course of trial embroiled the judge in a running, bitter controversy in which he was the target of slanderous and highly personal aspersions. *Id.* at 465-466. Given that the judge chose to wait until the trial was over

to adjudicate and sentence on the contempts, the proper course was to have the matter heard by another judge. *Id.* at 464-466.

In *Johnson v. Mississippi*, 403 U.S. 212 (1971), the summary contempt adjudication came some time after the allegedly contemptuous action, which had not occurred in the presence of the judge. Thus a hearing was necessary on that ground, and it was remanded to another judge because immediately prior to the adjudication of contempt the judge was a named defendant in a civil rights suit brought by petitioner. *Id.* at 215-216.

In *Taylor v. Hayes*, 418 U.S. 488 (1974), numerous contempts were cited by the judge, who had become personally embroiled in a running controversy with the petitioner during the trial. However, the final adjudication and sentence were postponed until after trial, thus negating the justification for the summary contempt holding. Moreover, the petitioner there was not afforded an opportunity to be heard. *Id.* at 496-498. Since minimal due process protections of notice and a hearing were not afforded petitioner, the case was remanded for a hearing by another judge on the contempts. *Id.* at 498-500.

In contrast to these cases, the exchanges of May 23 which led to the contempt here make it clear that the contempt was not based on personal embroilment by respondent Justice with petitioner. Instead, a lawful order was issued several times and was disobeyed in a contemptuous fashion, designed to impugn the integrity of the court and interfere with the functioning of its calendar. Unlike the exchanges in *Offutt*, *Mayberry*, and *Taylor*, which included vicious, personal attacks over an extended period of time during a heated trial, it was petitioner's refusal to follow the court's reasonable directives here that led to the contempt holding, not her alleged bias.

Moreover, the contempt holding here came as an immediate corrective step to restore order and maintain the dignity and authority of the court, *see Cooke*, 267 U.S. at 534, a measure which could not have been accomplished by referring the matter to another judge for adjudication. Indeed, were that step required on this record in order to uphold petitioner's due pro-

cess rights, the court's summary contempt power would be so vitiated as to make courtroom control by the judge an impossibility.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: New York, New York
August 27, 1992

Respectfully submitted,

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